IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 683

GEORGE W. HARTMANN,

Petitioner,

against

THE AMERICAN NEWS COMPANY, a Delaware Corporation,

Respondent.

PETITIONER'S REPLY BRIEF

ALFRED A. ALBERT,
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ANNA MAE DAVIS,
SIGMUND GOLDSTEIN,
of Counsel.

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Cases Cited

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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Statement on the Facts

Respondent states, (brief, p. 4) that petitioner was out of step with his Government during the active phase of the war, the inference being that this permitted opponents to smear petitioner as they pleased. Undoubtedly too, this regularized the use against him of any material regardless of "whether it was" "true or not" as the respondent's brief puts it (p. 13).

Also, that the slug "U. S. Indicts Fascists (continued)" was a common printer's device (p. 5) and this was conceded by petitioner's counsel. No such concession appears in the record. It shows that counsel stated that it was "common practice" "to break a story on two pages". Petitioner's counsel was interrupted while trying to call the Court's attention to the fact that it may be "general

practice" to run a story on two or more pages and to connect them "but" (R. 123). There being but one connected story, that relating to Fascist Indictments and Peace Now (R. 245), the headline "U. S. Indicts Fascists (continued)" immediately above petitioner's hairline indicated precisely that: that petitioner was an indicted fascist.

It is completely at variance with the facts for respondent to state that the questions presented to this Court, by the petition herein, were not urged upon the Courts below. The contrary is the case. Examination of the briefs below will establish this beyond peradventure of doubt. For such purpose, and because of the seriousness of the issue, sufficient copies thereof are being submitted simultaneously herewith.

Argument

Petitioner will attempt to reply to respondent's points, in the order in which they appear in the brief but will omit reply to inconsequential arguments and will avoid re-arguing matters in the brief submitted in support of the petition. Respondent has, in several places, in addition to the one already noted, inadequately or mistakenly interpreted the record, petitioner's brief and the decisions cited. And, has raised a new issue, although no cross-appeal was taken.

POINT I

Reply to Point I. The published charge is libelous per se.

At the very outset, it should be noted, that respondent made no attempt to answer petitioner's argument as to the applicability of the doctrine of *Peck* v. *Tribune* to the facts in the instant case. Finding itself unable to challenge petitioner's arguments and the sound reasoning of this august tribunal in that case and its direct bearing on the issues

involved here, it is urged that petitioner's petition and brief are presenting matters to this Court for the first time. There is absolutely no basis for such statement—and the briefs below are the best proof.

Respondent further contends that no proper objection was made to the instructions given or to the refusal to charge as requested and cites *Palmer* v. *Hoffman* and *Thiede* v. *Utah* (brief, p. 6). In the first case at page 119 and in the second at page 522 we find discussed the doctrine that exceptions must be sufficiently specific to call the court's attention to the precise matters complained of. This was raised before the trial court in the instant case on the motion for judgment notwithstanding the verdict. And the Court fully approved of the conduct of petitioner's counsel. The record, page 375 shows the following:

> "Mr. Orr: "Refused instruction. There is no error there. Counsel made blanket exception, and you can't make a blanket exception. She did not except separately as to each refused instruction.
>
> The Court: I think perhaps she did, it is my recollection.
>
> Mr. Orr: I know she didn't because—excuse me for contradicting—it is in writing. I have a copy of it in my office. She said, 'We except for failure to give instructions 1, 2, 4, 5 and 9.' That is not a specific exception.
>
> The Court: I would hold that would be sufficient. Go ahead" (R., p. 375).

This set the law of the case, for no appeal was taken. Moreover, who should know better than the Court of first instance whether the objections taken were specific enough to draw his attention to the precise points so that he may then and there consider them? Having answered affirmatively, on a matter designed to aid him, that answer is determinative of the issue.

In the same point we find the assertion that headlines must be *interpreted* in the light of the remainder of the article unless the headlines themselves identify the plaintiff. And again cases are cited, which do not support this contention.

In the *Woods* case, cited at page 7, the Court said:

> "• • • we find the respondent to be the object of an unfounded accusation by his wife. He is not charged with the commission of any offense or the doing of any act" (by the newspaper).

Now, it is abundantly clear that this is not the situation here. At bar we have a case where the headlines DO CHARGE AN INDICTMENT FOR A CRIME, a completely and wholly unwarranted accusation made by the respondent's alter ego, and distributed far, wide and handsome by the respondent who has come into Court, taking the position of an editor, namely, that the charge is true—but not one word of proof supports the charge.

In the other case cited, *Schoenfeld* v. *Journal Co.*, the Court pointed out that no one was named in the headlines, NO ONE WAS PICTURED, and the article was otherwise privileged. And this significant holding appears in that case at page 137.

> "There is authority to support, or tending to support the contention of the plaintiff that headlines may be libelous and the whole libel may be included in the headlines preceding an otherwise privileged article • • • (citing cases); but the headlines here complained of were not libelous. The plaintiff would have been on a different footing if the headlines had been otherwise and the plaintiff would be the clearly ascertained or ascertainable person of whom such headline was written and published."

Here, the headline charges petitioner with having been indicted and the headline appears directly over his picture. Hence every test made in the *Schoenfeld* case is met in full.

Next we come to the matter of negligence raised by respondent's brief at page 9, and evidence of custom. None of the cases are in point. The *Sprecher* case is one involving a Master and Servant.

The *Stasek* case concerned itself with interpreting a statute regulating the sale of poisonous drugs. The *Reiher* case turned on whether a *cuspidor* is customarily placed behind a newel post! The *Eich* case dealt with a situation where logging operators were plaintiff and defendant and because of peculiar traffic conditions on mountain roads had agreed with other logging operators that unloaded trucks were to give full right of way to loaded trucks.

None of these cases is authority for the proposition that by private agreement the rights of the public become obsolete and yield to the custom among the observants thereof. If that proposition were valid, then the giant monopolies would have a perfect defense to every anti-trust action; cartels would be perfectly legal, etc., etc.

It should be noted that the *Eich* case concerned itself with the parties to that understanding—not a stranger.

POINT II

Answering the argument on the rulings on the admission of evidence.

It seems to be respondent's argument that it is not enough to make several objections to a line of proof. Indeed, no! The objectant must continue to pop up and down like a jack-in-the-box until he makes himself obnox-

ious AND SO ANTAGONIZES THE COURT AND JURY. This same argument was made in the Circuit Court and while it was not covered in the opinion below, it should be noted that Judge Major definitely and decisively rejected this stating what has just been written.

The "proof" in this case followed a pattern—so many newspapers and periodicals published the same or similar libels. So many of these publications were sued. It seems to be abundantly clear that when several objections were taken and the Court fully apprised as to petitioner's (plaintiff's) position on this line of proof, that is all that was required. If the law is that proof of similar libels by other publications is not the concern of the Court and the Jury, then after calling this to the Court's attention by repeated objections taken and noted, and the Court's acknowledgment thereof, it is no longer necessary to pop up and down like a cork at sea. The various positions of Counsel are illustrated by what took place at the time of offering the Dies Report in evidence.

This appears in respondent's brief at pages 10 and 11. But what transpired is not set out in full. The record shows the following:

> Mr. Orr: I will offer Exhibit 57 in evidence.
>
> Mr. Goldstein: I object to it as incompetent, irrelevant and immaterial. It is subsequent to the publishing of the libels involved here.
>
> Mr. Orr: It is relevant on many counts, your Honor.
>
> The Court: Well, I was going to say, it may or may not be relevant, I think I will overrule the objection, without prejudice to your renewing it again at the end of the trial, if you think it has not been connected up in any way.
>
> Mr. Orr: Your Honor; may I state that it is already connected up?
>
> The Court: Well, I don't know.

Mr. Orr: This man has testified that he was made ill by this article.

We want to show the many documents that could have made him ill.

He testified that he lost his job by reason of the Life article. We want to show the many documents which would have accounted for that.

They were all prior to the illness, and the loss of the position.

The Court: What is the date of it?

Mr. Orr: The date is February 17th, 1944.

The Court: The present ruling is: It may be received over the objection (R. p. 84).

The respondent argues that petitioner should have again moved at the end of the trial with regard to the Dies Report. If petitioner had done so, then the illegal "evidence", which consisted of unfounded accusations of high crimes, would have had its effect upon the jury and the paper itself removed as evidence. Then respondent would have argued THAT NO HARM HAD BEEN DONE BECAUSE IT HAD BEEN EXPUNGED AS EVIDENCE. It seems to be quite plain that respondent knows that the "evidence" was highly objectionable and seeks to escape responsibility for its introduction by placing the burden now on petitioner to have moved to expunge it. ONCE THAT DOCUMENT WAS READ TO THE JURY A FAIR TRIAL WAS IMPOSSIBLE.

That the conviction for voyeurism of Collet and for leaving a CPS Camp by Dutko had no bearing on the issue in the case at bar of being an "indicted fascist" is considered in the main brief and will not be repeated here.

So too with regard to the speech of the late president, F. D. Roosevelt, except that it is necessary to call this Court's attention to its decision in *Palmer* v. *Hoffman*, 318 U. S. 109, 114. Respondent argues that the speech

was properly admitted in evidence. It is violative of the hearsay rule as announced by this High Court and it was pointed out that

> "Such a major change which opens wide the door to avoidance of cross-examination and should not be left to implication."

POINT III

Answering same point in respondent's brief.

In the *Sturm* case (brief, p. 13), preceding that part of the opinion which we find on that page, the Court noted several times that there were no requests for instructions. No exceptions were taken to the trial court's charge. As already noted in this reply brief, page 3, THAT IS NOT THE SITUATION AT BAR. The reverse is the fact. Here was done all that needs be done AND THE TRIAL COURT SO HELD.

In the *Edwards* case, next cited by respondent, the same situation prevailed, no requests were involved and no exceptions. And in the *United States* v. *Harrell* case, which respondent would have this Court believe is in point, a rule IN CONDEMNATION CASES was involved. The Court holding is the applicable rule in such cases is the procedure of the ARKANSAS COURTS IN CONDEMNATION PROCEEDINGS.

POINT IV

Respondent's attitude is that the end justifies the means.

This is amply demonstrated by the reckless abandon of respondent's argument found at the top of page 13. It argues, the speech of the late president was admissible to show the environment in which these pacifists

operated (and incidentally to make it appear that the late president was somehow a party to the action, as a defendant). And for this purpose *"it was immaterial whether the statements in the speech were true or not"*.

Other than to say that this is the cornerstone of totalitarian justice, no comment will be made for this bespeaks the entire motivation of the respondent as well as TIME, INC. in whose shoes it stepped in the defense in this case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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May 10, 1949.